No. 14,669

IN THE

United States Court of Appeals

For the Ninth Circuit

LOUIS FLEISH,

Appellant,

vs.

E. B. SWOPE, Warden, United States Penitentiary, Alcatraz, California,

Appellee.

BRIEF FOR APPELLEE.

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JURISDICTION.

This Court has jurisdiction under Sections 2241 and 2253 of Title 28 United States Code.

STATEMENT OF THE CASE.

This is an appeal from an order dismissing a petition for a writ of habeas corpus made and entered on December 11 and December 22, 1954 by United States District Judge Louis E. Goodman (Tr. 9, 11).

On November 1, 1954 appellant petitioned for a writ of habeas corpus (Tr. 6). On December 11,

1954 Judge Goodman dismissed this petition on the ground that appellant's proper relief was under Section 2255 (Tr. 8, 9). On December 22, 1954 Judge Goodman amended this order, citing *Butterfield v. Wilkinson,* 215 F. 2d 320 (9th Cir.), and dismissed the petition on the merits (Tr. 11).

Appellant claimed appellee had held him in excess of the maximum term imposed by the sentencing court. The basis of this claim is appellant's contention that the six sentences imposed on the six counts of the indictment under which he was sentenced should be interpreted to run concurrently (Tr. 4-6). Appellant has alleged in his petition that the judgment order of the United States District Court for the Eastern District of Michigan reads as follows (Tr. 4):

> "That the judgment order reads as follows:
>
> Count 1, Five (5) years;
>
> Count 3, Five (5) years;
>
> Count 12, Five (5) years;
>
> Count 15, Five (5) years;
>
> Count 18, Five (5) years; and under count 21, Five (5) years, said terms of imprisonment to run consecutively."

Appellant has served fifteen years of a thirty year term imposed by the United States District Court for the Eastern District of Michigan upon the six counts of the indictment (Tr. 8).

Appeal was timely made to this Court (Tr. 12).

QUESTION PRESENTED.

Need a court specify the order of sequence of consecutive sentences imposed on consecutively numbered counts in a single indictment?

ARGUMENT.

Appellant argues that the sentences imposed under the six counts of the indictment should be interpreted to run concurrently despite the court's direction that they were to run consecutively because the judgment order did not designate the exact day when each sentence would become effective (Tr. 5; Appellant's brief, page 4).

A similar contention was made in the case of *Lipscomb v. Madigan,* No. 14,730, in the Court of Appeals for the Ninth Circuit decided June 27, 1955. There, as here, the judgment order did not expressly specify the order of sequence in which the sentences should be served. This Court held, citing *United States v. Daugherty,* 269 U.S. 360, that the judgment was sufficient to impose consecutive sentences "to be served consecutively and to follow each other in the same sequence as the counts appeared in the indictment."

The *Daugherty* case, supra, is identical with the one at bar. There, as here, the prisoner was convicted on a number of counts in the same indictment

and received consecutive sentences therefor. The court did not specify in what sequence the sentences should be served. The Supreme Court, however, declared that the "reasonable and natural implication" from the judgment was that the sentences were "to follow each other in the same sequence as the counts appeared in the indictment." The court went on to say that while "sentences in criminal cases should reveal with fair certainty the intent of the court and exclude any serious misapprehension by those who must execute them. The elimination of every possible doubt cannot be demanded."

In the case of *Mixon v. Paul* (4th Cir.), 175 F. 2d 441, where there were two counts in a single indictment and the court ordered that the sentences be consecutive, the court held that the sentences should be served in numerical sequence. In *Yelvington v. United States* (10th Cir.), 178 F. 2d 915, where there was no specification of the order of consecutive sentences, the court held that they should be served in numerical sequence. See also *Phillips v. United States* (8th Cir.), 184 F. 2d 573; *McKee v. Johnson* (9th Cir.), 109 F. 2d 273. This Court has also ruled adversely to appellant's contention in *Van Gorder v. Johnson* (9th Cir.), 82 F. 2d 729.

There is no doubt as to the intention of the sentencing court in this case. The court intended that appellant's sentences be consecutive. The order in which these sentences should be served is obviously

the order in which they appear and are numbered in the judgment. The judgment of the court below should be affirmed.

Dated, San Francisco, California,
July 20, 1955.

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